

A Ginlon (M) Sdn Bhd v MBf Finance Berhad

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-436
OF 1997
MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND ABDUL AZIZ JJCA
4 MARCH 2004

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Land Law — Charge — Validity of — Land charged as security for loan — Chargor refused to consent of assignment — Whether variation in loan agreement existed — Whether chargor's refusal of consent rendered charge null and void by virtue of s 86 Contracts Act 1950 — Whether consequence of s 86 was discharge of surety and not invalidation of charge

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This was an appeal to determine whether the charge was null and void in consequence of the operation of s 86 of the Contracts Act 1950 ('the Act'); and whether there was a variance in the loan agreement as there was a waiver of the assignment. The facts were that by a letter of offer, the respondent, a licensed finance company, agreed to grant a loan of RM300,000 to a company called Pembinaan Ikhlas-Jae Sdn Bhd ('the borrower'). Among the securities specified in the letter of offer were a charge on the appellant's land and an assignment to the respondent of payments due to the borrower from a project by one MBf Construction Sdn Bhd. Subsequently, the loan agreement was duly executed between the borrower and the respondent for a loan of RM250,000, not RM300,000. The loan agreement did not specify the assignment as one of the securities for the loan. The borrower sought from the respondent a waiver of the assignment as security on the ground that MBf Construction Sdn Bhd refused consent to the assignment. The respondent agreed to the said waiver and that the loan amount was reduced from RM300,000 to RM250,000 due to insufficient security coverage. Subsequently, the loan sum of RM250,000 was disbursed. Upon default of the loan, the respondent sought to enforce the charge by applying to the Land Office for an order for sale. The appellant then commenced an action in the High Court for a declaration that the charge was null and void by virtue of s 86 of the Act. The appellant submitted that there was a variance in the loan agreement as there was a waiver of the assignment. The learned judge dismissed the action. Hence, the appellant's appeal.

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Held, dismissing the appeal:

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(1) There was no variance in the terms of the contract, ie the loan agreement as regards the assignment for the term as to the assignment was never in the contract in the first place. The question of s 86 of the Act could not even begin to arise. Even if the loan agreement had contained the term as to the assignment and subsequently the term was removed without the consent of the appellants, s 86 would still not apply in this case. It was not intended to operate so as to effect a charge. The consequence of s 86 was the discharge of the surety and not the invalidation of a charge (see paras 8-9).

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- (2) For there to be a surety, under s 79 of the Act, there must be a contract of guarantee, in which the surety undertakes to perform the promise, or discharge the liability, of a third person in case of the third person's default. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee if the third person defaults. The remedy is against the person of the surety (see para 10).
- (3) By the charge, the chargor does not guarantee to perform the promise or discharge the liability of a third person in case of his default. The remedy under the charge is not against the person of the chargor but against the property charged, ie the remedy of sale or taking possession of the property. A charge is not a contract of guarantee and the chargor is not a surety. Therefore, a charge is a statutory instrument, a dealing that the Code authorizes. Thus, even if there had been a variance of the loan agreement in this case by the waiver of the assignment and the variance was made without the appellant's consent, s 86 did not apply to render the charge void in consequence (see paras 10–11); *Co-operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373 followed.

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[Bahasa Malaysia summary]

Ini adalah rayuan untuk menentukan sama ada gadaian adalah terbatal dan tidak sah menurut pelaksanaan s 86 Akta Kontrak 1950 ('Akta tersebut'); dan sama ada terdapat perbezaan dalam perjanjian pinjaman kerana terdapat penepian serahhak. Fakta adalah melalui surat tawaran, responden, sebuah syarikat kewangan berlesen, telah bersetuju untuk memberikan pinjaman sejumlah RM300,000 kepada sebuah syarikat bernama Pembinaan Ikhlas-Jae Sdn Bhd ('peminjam tersebut'). Antara cagaran yang dinyatakan dalam surat tersebut adalah gadaian ke atas tanah perayu dan satu serahhak kepada responden terhadap bayaran yang perlu dibayar kepada peminjam daripada satu projek oleh MBf Construction Sdn Bhd. Berikutan itu, perjanjian pinjaman tersebut telah disempurnakan antara peminjam dan responden untuk pinjaman berjumlah RM250,000, dan bukan RM300,000. Perjanjian pinjaman tersebut tidak menyatakan serahhak tersebut sebagai salah satu daripada cagaran untuk pinjaman tersebut. Peminjam telah memohon responden satu penepian serahhak tersebut sebagai cagaran atas alasan bahawa MBf Construction Sdn Bhd enggan bersetuju dengan serahhak tersebut. Responden telah bersetuju dengan penepian tersebut dan bahawa jumlah pinjaman tersebut dikurangkan daripada RM300,000 kepada RM250,000 disebabkan liputan cagaran yang tidak mencukupi. Berikutan itu, jumlah pinjaman RM250,000 telah didahulukan. Akibat kegagalan dalam pinjaman tersebut, responden memohon untuk menguatkuasakan gadaian tersebut dengan memohon kepada Pejabat Tanah untuk satu perintah jualan. Perayu kemudian telah memulakan satu tindakan di Mahkamah Tinggi untuk satu deklarasi bahawa gadaian tersebut adalah terbatal dan tidak sah menurut s 86 Akta

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A tersebut. Perayu berhujah bahawa terdapat perbezaan dalam perjanjian pinjaman tersebut kerana terdapat satu penepian serahhak. Hakim yang bijaksana telah menolak tindakan tersebut. Justeru itu, perayu telah merayu.

B **Diputuskan,** menolak rayuan tersebut:

C (1) Tiada perbezaan dalam terma kontrak, iaitu perjanjian pinjaman berkaitan serahhak kerana terma berkaitan serahhak tersebut tidak ada dalam kontrak langsung. Persoalan berhubung s 86 Akta tersebut tidak boleh timbul. Walaupun perjanjian pinjaman tersebut mengandungi terma berkaitan serahhak dan seterusnya terma tersebut telah dipotong tanpa persetujuan perayu-perayu, s 86 masih tidak terpakai dalam kes ini. Ia tidak bertujuan untuk memberi kesan kepada suatu gadaian. Akibat pelaksanaan s 86 adalah pelepasan penjamin dan bukan untuk menjadikan gadaian itu tidak sah (lihat perenggan-perenggan 8–9).

D (2) Untuk adanya penjamin, di bawah s 79 Akta tersebut, perlu terdapat satu kontrak jaminan, di mana penjamin mengakujani untuk melaksanakan perjanjian tersebut, atau melepaskan liabiliti, pihak ketiga sekiranya pihak ketiga itu gagal. Remedi seseorang di mana jaminan tersebut diberikan adalah untuk menyaman penjamin tersebut atas akujanjinya dalam kontrak jaminan jika pihak ketiga gagal. Remedi tersebut adalah terhadap seseorang yang menjamin (lihat perenggan 10).

E (3) Melalui gadaian, penggadaai tidak memberi jaminan untuk melaksanakan perjanjian atau melepaskan liabiliti pihak ketiga jika berlaku kegagalan. Remedi di bawah gadaian bukan terhadap seorang penggadaai tetapi terhadap hartanah yang digadaikan, iaitu remedi jualan atau mengambil milikan ke atas hartanah tersebut. Suatu gadaian bukan satu kontrak jaminan dan penggadaai bukan penjamin. Oleh itu, suatu gadaian adalah satu alat statutori, satu urusan yang diberikuasa oleh Kanun. Dengan itu, walaupun terdapat perbezaan dalam perjanjian pinjaman dalam kes ini dengan penepian serahhak dan perbezaan tersebut telah dibuat tanpa persetujuan perayu, s 86 tidak terpakai untuk mengakibatkan gadaian tersebut tidak sah (lihat perenggan-perenggan 10–11); *Co-operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373 diikuti.]

H Notes

For cases on validity of charges, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2093–2098.

I Cases referred to

Co-operative Central Bank Ltd v Y & W Development Sdn Bhd [1997] 3 MLJ 373 (folld)

Legislation referred to

Contracts Act 1950 ss 79, 86
National Land Code ss 253(1), 271(1)

Appeal from: Suit No D3–22–653 OF 1994 (High Court, Kuala Lumpur)

Ngeow Chow Ying (C Y Ngeow & Assoc) for the appellant.
Trevor George De Silva (Cik Mazura Kamaludin with him) (Shook Lin & Bok)
for the respondent.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] The appellant company had charged under the National Land Code a land of theirs to the respondent, a licensed finance company, as one of the securities for a loan given by the respondent to a company called Pembinaan Ikhlas-Jae Sdn Bhd ('the borrower'). The respondent subsequently sought to enforce the charge by applying to the Land Office for an order for sale. The appellant commenced an action in the High Court for a declaration that the charge was null and void, and for two orders that obviously were consequential orders, namely, an order stopping the enforcement action in the Land Office and an order that the title to the land be returned to the appellant. The judge dismissed the action and the appellant appealed to this court. We dismissed the appeal.

[2] As far as the appeal was concerned, the facts that need be set out are these. By a letter of offer dated 1 August 1991, as amended on 29 August 1991, the respondent agreed to grant a loan of RM300,000 to the borrower. Among the securities specified in the letter of offer were a first fixed legal charge over 22 plots of land, one of which was the appellant's land, and an assignment from the borrower to the respondent of payments due to the borrower from a project that had been awarded to the borrower by MBf Construction Sdn Bhd.

[3] On 3 September 1991, a loan agreement was duly executed by the borrower and the respondent for a loan of RM250,000, not RM300,000. The loan agreement did not specify the assignment as one of the securities for the loan. On the same date, 3 September 1991, the appellant executed the charge over their land in favour of the respondent as security for the loan of RM250,000, not RM300,000. The charge was registered on 9 September 1991. By a letter dated 10 September 1991, the borrower sought from the respondent a waiver of the assignment as a security on the ground that MBf Construction Sdn Bhd had refused their consent to the assignment. On 11 September 1991, the respondent replied agreeing to the deletion of the condition as to the assignment in the letter of offer and saying that the loan amount had been reduced from RM300,000 to RM250,000 'due to the insufficient security coverage'. On 12 September 1991, the loan sum of RM250,000 was disbursed. It will be obvious from those facts that although the correspondence regarding waiver of the assignment and the consequential reduction of the loan to RM250,000 took place after the loan agreement

- A** and the charge were executed on 3 September 1991, when the loan agreement and the charge were executed on that date the waiver and the reduction had already been effected.

[4] Practically the only question that arose in the appeal was whether the charge was null and void in consequence of the operation of s 86 of the

- B** Contracts Act 1950 ('the Act'), which provides as follows:

Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

- C** [5] If the section applies in this case, the 'principal debtor' would be the borrower, the creditor would be the respondent and the surety would be the appellant. In the appeal, the stand taken by the appellant's counsel was that the contract for the purposes of s 86 was the loan agreement of 3 September 1991. In submission in the High Court, the variance in the terms of the contract relied on by the appellant was the waiver of the assignment, although the variance specifically mentioned in the statement of claim was
- D** the reduction of the loan sum.

[6] This was what the judge said on the question:

To my mind the waiver of the assignment is not a variance that would entitle the plaintiff as a surety to be discharged from its liability. The assignment is another security which is independent of the charge executed by the plaintiff in favour of the defendant. The waiver of the assignment does not in any way alter the liability and obligations of the plaintiffs as nothing is stated in the annexure to the charge that this requirement is a term therein.

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- F** [7] There seemed to have been some dispute in the High Court as to whether the appellant had consented to the alleged variance, because the judge said that the question was irrelevant in view of his finding that there was no variance.

- G** [8] To our mind there was no variance in the terms of the contract, that is the loan agreement of 3 September 1991, as regards the assignment, for the simple reason that, as has been seen, the term as to the assignment was never in the contract in the first place. The question of the application of s 86 could not even begin to arise.

- H** [9] But even if the loan agreement had contained the term as to the assignment and subsequently the term was agreed to be removed without the consent of the appellant, to our mind s 86 would still not apply in this case. It is not intended to operate so as to affect a charge. The consequence of s 86 is the discharge of the surety and not the invalidation of a charge. Section 79 of the Act provides, in its first part, as follows:

A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; ...'

- I** [10] For there to be a surety, therefore, there must be a contract of guarantee, in which the surety undertakes to perform the promise, or

discharge the liability, of a third person in case of the third person's default. It is statutorily a three-party situation, although the third party is not a party to a contract of guarantee. Section 81 provides: 'The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract', that is the contract of guarantee. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee if the third person defaults. The remedy is against the person of the surety. In the case of a charge, however, even a third-party charge, it is statutorily a bipartite situation between the chargor and the chargee. The default giving rise to remedies under the charge is always, statutorily, the default of the chargor, not of any third person. Thus s 253(1) of the National Land Code speaks of the chargee obtaining the sale of the land charged 'in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein', that is, in the charge. And s 271(1) speaks of the chargee's right to enter into possession of the land charged 'at any time when the chargor is in breach of any agreement on his part expressed or implied in the charge'. By the charge, therefore, the chargor does not guarantee 'to perform the promise, or discharge the liability, of a third person in case of his default'. And the remedy under the charge is not against the person of the chargor but against the property charged, that is the remedy of sale or taking possession of the property. Therefore, a charge is not a contract of guarantee and the chargor is not a surety. According to *Co-operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3MLJ 373, a decision of this court, a registered charge is not even a contract. Gopal Sri Ram JCA said at p 376:

A registered charge is not a contract. It is a statutory instrument; a dealing; which the Code authorizes.

[11] To conclude, even if there had been a variance of the loan agreement in this case by the waiver of the assignment and the variance was made without the appellant's consent, s 86 did not apply to render the charge void in consequence.

[12] The question of indefeasibility of title, which was argued in the High Court and in this appeal, would only arise should the appellant succeed in their s 86 argument that the charge was void. The question that would have arisen then would be one of overcoming s 340(1) of the National Land Code, which gives indefeasibility to the title of the respondent to the land as a registered chargee. The appellant did not seek to argue that the respondent's title would not be indefeasible by virtue of any of the circumstances set out in sub-s (2). They relied rather on sub-s (4)(b) which provides: 'Nothing in this section shall prejudice or prevent — (b) the determination of any title or interest by operation of law'. The effect of the subsection is that indefeasibility of title cannot be set up to prevent the determination of a title by operation of law. The question that would have arisen under sub-s (4)(b) would have been whether, the charge being void, there was determination of the title of the respondent 'by

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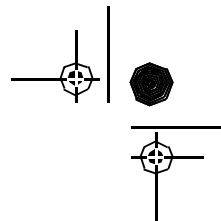
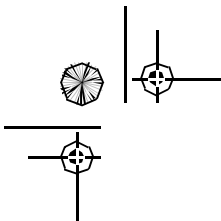
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A operation of law'. Would it be a case of determination of title by operation of law that is intended by that provision? As the appellant failed in their s 86 argument, we did not think it was necessary to consider the question to determine the appeal and to dismiss it.

B *Appeal dismissed.*

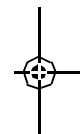
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